



September 26, 2022

VIA FOIAONLINE.REGULATIONS.GOV

U.S. Environmental Protection Agency

Re: Freedom of Information Act Request: New Wales Phosphogypsum Stack Sinkhole

Dear FOIA Officer:

This is a request under the Freedom of Information Act¹ (“FOIA”), from the Center for Biological Diversity (“Center”), a non-profit organization that works to secure a future for all species hovering on the brink of extinction through science, law, and creative media, and to fulfill the continuing educational goals of its membership and the general public in the process.

REQUESTED RECORDS

The Center the is requesting the records outlined below from the U.S. Environmental Protection Agency (“EPA”) from May 15, 2021 to the date EPA conducts this search, the records generated in connection with EPA’s receipt and discussion of the following letters, and the subject matter therewithin:

1. Attachment A (Center for Biological Diversity, *et al* July 21, 2022 Letter to EPA);
and
2. Attachment B (EPA’s C. Kemker’s Letter to J.W. Glass), specifically how EPA came to the conclusions it presents.

For this request, the term “records” refers to documents, correspondence (including inter and/or intra-agency correspondence as well as correspondence with entities or individuals outside the federal government), *emails including attachments*, letters, notes, recordings, telephone records, telephone notes, telephone logs, text messages, chat messages, minutes, memoranda, comments, files, presentations, consultations, biological opinions, assessments, evaluations, schedules, papers published and/or unpublished, reports, studies, photographs and other images, data (including raw data, GPS or GIS data, UTM, LiDAR, etc.), maps, and/or all other responsive records, in draft or final form.

This request is not meant to exclude any other records that, although not specially requested, are reasonably related to the subject matter of this request. If you or your office have destroyed or determine to withhold any records that could be reasonably construed to be responsive to this request, I ask that you indicate this fact and the reasons therefore in your response.

¹ 5 U.S.C. § 552, *as amended*.

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption.²

Should you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

If you determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and mail the non-exempt portions of such records to my attention at the address below within the statutory time limit.³

The Center is willing to receive records on a rolling basis.

THE FREEDOM OF INFORMATION ACT

The purpose of FOIA is to “open agency action to the light of public scrutiny.”⁴ President Biden emphasized the “presumption of openness” with regard to FOIA.⁵ Attorney General Merrick Garland’s memorandum guides agencies to 1) withhold records only if they reasonably foresee that disclosure would harm an interest protected by one of the nine exemptions that FOIA enumerates or disclosure is prohibited by law, 2) make proactive disclosures, 3) remove barriers to access, and 4) ensure fair and effective FOIA administration.⁶ In another prior memorandum, Former Attorney General Eric Holder set forth the “foreseeable harm” standard for defending agency decisions to withhold information under FOIA.⁷ Thus, the DOJ will defend an agency’s denial of a FOIA request “only if (1) the agency reasonably foresees that disclosure would harm

² FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

³ 5 U.S.C. § 552(b).

⁴ *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976).

⁵ See *Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act Guidelines*, (Mar. 15, 2022).

⁶ See *id.*; Former President Obama reinforced FOIA’s strong presumption of disclosure with regard to all FOIA decisions. See *Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act*, 74 Fed. Reg. 4683 (Jan. 21, 2009) (directing agencies to administer FOIA under a presumption that guidelines reinforce a commitment to open government, encouraging federal agencies to both “make discretionary releases of information” and to “make partial disclosures” when an agency determines full disclosure is not possible). See also *Former Attorney General Eric Holder’s Memorandum for Heads of Executive Departments and Agencies* (Mar. 19, 2009).

⁷ *Id.*

an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.”⁸ These authorities remain in effect.

FOIA’s “frequently requested record” provision was enacted as part of the 1996 Electronic Freedom of Information Act Amendments, and requires all federal agencies to give “reading room” treatment to any FOIA-processed records that, “because of the nature of their subject matter, the agency determines have become the subject of subsequent requests for substantially the same records.”⁹ Also, enacted as part of the 2016 FOIA Improvement Act, FOIA’s Rule of 3 requires all federal agencies to proactively “make available for public inspection in an electronic format” “copies of records, regardless of form or format ... that have been released to any person ... and ... that have been requested 3 or more times.”¹⁰ Therefore, we respectfully request that you make available online any records that the agency determines will become the subject of subsequent requests for substantially the same records, and records that have been requested three or more times.

Finally, agencies must preserve all the records requested herein while this FOIA is pending or under appeal. The agency shall not destroy any records while they are the subject of a pending request, appeal, or lawsuit under the FOIA.¹¹ If any of the requested records are destroyed, the agency and responsible officials are subject to attorney fee awards and sanctions, including fines and disciplinary action. A court held an agency in contempt for “contumacious conduct” and ordered the agency to pay plaintiff’s costs and fees for destroying “potentially responsive material contained on hard drives and email backup tapes.”¹² In another case, in addition to imposing a \$10,000 fine and awarding attorneys’ fees and costs, the court found that an Assistant United States Attorney prematurely “destroyed records responsive to [the] FOIA request while [the FOIA] litigation was pending” and referred him to the Department of Justice’s Office of Professional Responsibility.¹³

FORMAT OF REQUESTED RECORDS

Under FOIA, you are obligated to provide records in a readily accessible electronic format and in the format requested.¹⁴ “Readily accessible” means text-searchable and OCR-formatted.¹⁵ Pursuant to this requirement, we hereby request that you produce all records in an electronic

⁸ *See id.*

⁹ *Id.* § 552(a)(2)(D)(ii)(I).

¹⁰ *Id.* § 552(a)(2)(D)(ii)(II).

¹¹ 40 C.F.R. § 2.106; *see Chambers v. U.S. Dept. of Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2009) (“[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under FOIA or the Privacy Act”).

¹² *Landmark Legal Found. v. EPA*, 272 F. Supp.2d 59, 62 (D.D.C. 2003); *see also Judicial Watch, Inc. v. Dept. of Commerce*, 384 F. Supp. 2d 163, 169 (D.D.C. 2005) (awarding attorneys’ fees and costs because, among other factors, agency’s “initial search was unlawful and egregiously mishandled and ...likely responsive documents were destroyed and removed”), *aff’d in relevant part*, 470 F.3d 363, 375 (D.C. Cir. 2006) (remanding in part to recalculate attorney fees assessed).

¹³ *Jefferson v. Reno*, 123 F. Supp. 2d 1, 6 (D.D.C. 2000).

¹⁴ 5 U.S.C. § 552(a)(3)(B) (“In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”).

¹⁵ *See id.*

format and in their native file formats. Additionally, please provide the records in a load-ready format with a CSV file index or Excel spreadsheet. If you produce files in .PDF format, then please omit any “portfolios” or “embedded files.” Portfolios and embedded files within files are not readily accessible. Please do not provide the records in a single, or “batched,” .PDF file. We appreciate the inclusion of an index.

If you should seek to withhold or redact any responsive records, we request that you: (1) identify each such record with specificity (including date, author, recipient, and parties copied); (2) explain in full the basis for withholding responsive material; and (3) provide all segregable portions of the records for which you claim a specific exemption.¹⁶ Please correlate any redactions with specific exemptions under FOIA.

RECORD DELIVERY

We appreciate your help in expeditiously obtaining a determination on the requested records. As mandated in FOIA, we anticipate a reply within 20 working days.¹⁷ Failure to comply within the statutory timeframe may result in the Center taking additional steps to ensure timely receipt of the requested materials. Please provide a complete reply as expeditiously as possible. We prefer email, but you may mail copies of records to:

Ann K. Brown
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211
foia@biologicaldiversity.org

If you find that this request is unclear, or if the responsive records are voluminous, please email me to discuss the scope of this request.

REQUEST FOR FEE WAIVER

FOIA was designed to provide citizens a broad right to access government records. FOIA’s basic purpose is to “open agency action to the light of public scrutiny,” with a focus on the public’s “right to be informed about what their government is up to.”¹⁸ In order to provide public access to this information, FOIA’s fee waiver provision requires that “[d]ocuments shall be furnished without any charge or at a [reduced] charge,” if the request satisfies the standard¹⁹. FOIA’s fee waiver requirement is “liberally construed.”²⁰

The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as the Center access to government records without the payment of fees. Indeed, FOIA’s

¹⁶ *Id.* § 552(b).

¹⁷ *Id.* § 552(a)(6)(A)(i).

¹⁸ *NARA v. Favish*, 541 U.S. 157, 171 (2004) quoting *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted).

¹⁹ 5 U.S.C. § 552(a)(4)(A)(iii).

²⁰ *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

fee waiver provision was intended “to prevent government agencies from using high fees to discourage certain types of requesters and requests,” which are “consistently associated with requests from journalists, scholars, and *non-profit public interest groups*.”²¹ As one Senator stated, “[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information”²²

I. The Center Qualifies for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government and is not primarily in the commercial interest of the requester.”²³ EPA’s regulations establish the same standard.²⁴

Thus, EPA must consider six factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns “the operations or activities of the Federal government,” (2) whether the disclosure is “likely to contribute” to an understanding of government operations or activities, (3) whether the disclosure “will contribute to public understanding” of a reasonably broad audience of persons interested in the subject, (4) whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities²⁵, (5) whether a commercial interest exists and its magnitude, and (6) the primary interest in disclosure. As shown below, the Center meets each of these factors.

A. The Subject of This Request Concerns “The Operations and Activities of the Government.”

The subject matter of this request concerns the operations and activities of the EPA. This request asks for from May 15, 2021 to the date EPA conducts this search, the records generated in connection with EPA’s receipt and discussion of the following letters, and the subject matter therewithin: (1) Attachment A; and (2) Attachment B. The Center is particularly interested in how the agency came to the conclusions it presents in Attachment B.

This FOIA request will provide the Center and the public with crucial insight into the environmental impact of a sinkhole forming at New Wales phosphogypsum stack in Mulberry, Florida. It is clear that a federal agency’s regulation of phosphogypsum stacks is identifiable activity of the government, and in this case it is the executive branch agency of EPA.²⁶ Thus, the Center meets this factor.

²¹ *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984) (emphasis added).

²² 132 Cong. Rec. S. 14298 (statement of Senator Leahy).

²³ 5 U.S.C. § 552(a)(4)(A)(iii).

²⁴ 40 C.F.R. § 2.107(l)(1)-(3).

²⁵ *Id.* § 2.107(l)(2).

²⁶ *Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity is all that FOIA requires with regard to this factor”) (internal quotations omitted).

B. Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities.

The requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public. Disclosure of the requested records will allow the Center to convey information to the public about what steps EPA has taken after reviewing evidence that a sinkhole was forming at New Wales, which is creating a potential environmental disaster. Once the information is made available, the Center will analyze it and present it to its over 1.7 million members and online activists and the general public in a manner that will meaningfully enhance the public’s understanding of this topic.

Thus, the requested records are likely to contribute to an understanding of EPA’s operations and activities.

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons’ Understanding of EPA’s Oversight of the New Wales Phosphogypsum Stack Sinkhole.

The requested records will contribute to public understanding of whether EPA’s actions are consistent with its mission “to protect human health and the environment.”²⁷ As explained above, the records will contribute to public understanding of this topic.

Activities of EPA generally, and specifically its response to a mounting toxic disaster, are areas of interest to a reasonably broad segment of the public. The Center will use the information it obtains from the disclosed records to educate the public at large about this topic.²⁸

Through the Center’s synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained in and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter.²⁹

Indeed, the public does not currently have an ability to easily evaluate the requested records, which are not currently in the public domain.³⁰ As the Ninth Circuit observed in *McClellan*

²⁷ EPA, *Our Mission And What We Do*, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do> (last visited Sep. 26, 2022).

²⁸ See *W. Watersheds Proj. v. Brown*, 318 F. Supp.2d 1036, 1040 (D. Idaho 2004) (finding that “WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment”).

²⁹ *Ettlinger v. FBI*, 596 F. Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dept. of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), *cert. denied*, 513 U.S. 823 (1994) (applying “public” to require a sufficient “breadth of benefit” beyond the requester’s own interests); *Cnty. Legal Servs. v. Dep’t of Hous. & Urban Dev.*, 405 F. Supp.2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester’s “work by its nature is unlikely to reach a very general audience,” “there is a segment of the public that is interested in its work”).

³⁰ See *Cnty. Legal Servs.*, 405 F. Supp.2d at 560 (because requested records “clarify important facts” about agency policy, “the CLS request would likely shed light on information that is new to the interested public.”).

Ecological Seepage Situation v. Carlucci, “[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations... .”³¹

Disclosure of these records is not only “likely to contribute,” but is certain to contribute, to the public’s understanding of what efforts are currently needed to mitigate the effects of the stack and subsequent sinkhole, and how the agency reaches conclusions that the situation is stable. The public is always well served when it knows how the government conducts its activities, particularly matters touching on legal questions. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about this topic.

II. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

The Center is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public’s understanding of whether EPA is responding appropriately to the environmental, as compared to the level of public understanding that exists prior to the disclosure. Indeed, public understanding will be *significantly* increased as a result of disclosure because the requested records will help reveal more about this subject matter.

The records are also certain to shed light on EPA’s compliance with its own mission and purpose. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, the Center meets this factor as well.

III. Obtaining the Requested Records is of No Commercial Interest to the Center.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to the Center’s role of educating the general public. Founded in 1994, the Center is a 501(c)(3) nonprofit conservation organization (EIN: 27-3943866) with more than over 1.7 million members and online activists dedicated to the protection of endangered and threatened species and wild places. The Center has no commercial interest and will realize no commercial benefit from the release of the requested records.

IV. The Center’s Primary Interest in Disclosure is the Public Interest.

As stated above, the Center has no commercial interest that would be furthered by disclosure. Although even if it did have an interest, the public interest would far outweigh any pecuniary interest.

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been

³¹ *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987). In this connection, it is immaterial whether any portion of the Center’s request may currently be in the public domain because the Center requests considerably more than any piece of information that may currently be available to other individuals. See *Judicial Watch*, 326 F.3d at 1315.

substantially involved in the activities of numerous government agencies for over 25 years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

In consistently granting the Center's fee waivers, agencies have recognized: (1) that the information requested by the Center contributes significantly to the public's understanding of the government's operations or activities; (2) that the information enhances the public's understanding to a greater degree than currently exists; (3) that the Center possesses the expertise to explain the requested information to the public; (4) that the Center possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes the Center as an established expert in the field of imperiled species, biodiversity, and impacts on protected species. The Center's track record of active participation in oversight of governmental activities and decision making, and its consistent contribution to the public's understanding of those activities as compared to the level of public understanding prior to disclosure are well established.

The Center's work appears in over 5,000 news stories online and in print, radio, and TV per month, including regular reporting in such important outlets as *The New York Times*, *Washington Post*, *The Guardian*, *Los Angeles Times*, and *USA Today*. Many media outlets have reported on the dangers of hazardous waste utilizing information obtained by the Center from state and federal agencies. In 2021, more than 3.5 million people visited the Center's extensive website, viewing pages more than 6.3 million times. In 2021, nearly 2.4 million actions were completed by more than 1.7 million members and supporters. Three times a year, the Center sends printed newsletters to more than 89,610 members. More than 606,000 people follow the Center on Facebook, and there are regular postings regarding environmental protection. The Center also regularly tweets to more than 121,000 followers on Twitter, and has more than 40,000 followers on Instagram. The Center intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request. The Center intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request.

Public oversight and enhanced understanding of the EPA's duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably broad audience of persons interested in the subject.³² The Center need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity."³³ It is sufficient for the Center to show how it distributes information to the public generally.³⁴

V. Conclusion

For all of the foregoing reasons, the Center qualifies for a full fee waiver. We hope that EPA will immediately grant this fee waiver request and begin to search and disclose the requested records without any unnecessary delays.

³² *Carney*, 19 F.3d 807.

³³ *Judicial Watch*, 326 F.3d at 1314.

³⁴ *Id.*

If you have any questions, please contact me at foia@biologicaldiversity.org. All records and any related correspondence should be sent to my attention at the address below.

Sincerely,

A handwritten signature in dark ink, appearing to read "Ann K. Brown", with a long, sweeping horizontal stroke at the end.

Ann K. Brown
Open Government Coordinator
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 11374
Portland, OR 97211-0374
foia@biologicaldiversity.org

Attachments

Attachment A (Center for Biological Diversity, *et al* July 21, 2022 Letter to EPA)
Attachment B (EPA's C. Kemker's Letter to J.W. Glass)

Attachment A



July 21, 2022

The Honorable Michael Regan
Administrator
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460-0001

Radhika Fox
Assistant Administrator for Water
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460-0001

Lawrence Starfield
Principal Deputy Assistant Administrator
Office of Enforcement and Compliance Assurance
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460-0001

Carlton Waterhouse
Deputy Assistant Administrator
Office of Land and Emergency Management
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460-0001

**Re: EPA Must Take Immediate Action to Prevent an Imminent Environmental
Emergency at the Country's Largest Phosphogypsum Stack**

Dear Administrator Regan, Assistant Administrator Fox, Principal Deputy Assistant
Administrator Starfield, and Deputy Assistant Administrator Waterhouse,

We write concerning the New Wales phosphogypsum stack in Mulberry, Florida, and the
potential for an imminent environmental disaster following the Florida Department of
Environmental Protection's ("FDEP") authorization to expand the stack via its delegated Clean
Water Act ("CWA") Section 402 authority.¹

These stacks of toxic, radioactive waste from processing phosphoric acid are prone to
environmental disaster, and action to prevent serious damage is often too little or too late. The
New Wales stack in particular has already had four sinkholes that have dumped millions of
gallons of toxic wastewater into the Floridan aquifer, which provides drinking water for millions
of people.² Since the Environmental Protection Agency ("EPA") failed to veto this stack's
expansion, despite the applicant's apparent lack of reasonable assurances required to prevent
disaster, seismic activity has halted construction while a potential liner tear could result in an
unknown quantity of acidic water released into the aquifer.³ To prevent another environmental
catastrophe, the EPA must utilize its emergency powers under Section 7003 of the Resource
Conservation and Recovery Act ("RCRA") and Section 504 of the CWA to restrain the reckless
activity at the New Wales stack.⁴

¹ National Pollutant Discharge Elimination System PA File No. FL0036421-022-IW1S/RA.

² Pittman, Craig, *Phosphate pollution reports give Florida residents déjà vu*, Florida Phoenix (Sept. 9, 2020).

³ FDEP, New Wales Suspected Liner Tear, Incident No. 20221823 (Mar. 24 2022, 4:09 p.m.) available at <https://web.archive.org/web/20220705163407/https://prodenv.dep.state.fl.us/DepPNP/reports/viewIncidentDetails?page=41>.

⁴ 42 U.S.C § 6973; 33 U.S.C. § 1364.

The New Wales stack has a sordid history of environmental issues that have endangered the public. New Wales has already suffered massive sinkholes in 1994, 2004, 2013, and 2016, with the most recent reported sinkhole causing 215 million gallons of acidic process water and an unknown quantity of radioactive phosphogypsum to collapse into the Floridan aquifer.⁵ That toxic waste remains in the aquifer to this day, even as Mosaic has continued to pump from recovery wells for years in attempts to recover contaminated groundwater.⁶

After the FDEP approved the New Wales stack expansion, seismic activity demonstrating the potential to “adversely affect the integrity of the stack” drove construction to a halt.⁷ While seismic activity has been continuously reported at the stack since, engineers have also observed and reported unexplained changes in water levels at reservoir ponds that hold millions of gallons of polluted water.⁸ On the evening of March 23, 2022, workers observed low water level readings indicative of a tear in New Wales reservoir pond’s HDPE liner, a liner that is critical to preventing toxic water from seeping into groundwater that millions rely on for drinking and household use. The next day, the FDEP issued a Notice of Pollution indicating that recent site monitoring is “indicative of a potential liner tear” that “could result in an indeterminate volume of process water released to the environment.”⁹ Since reporting this “potential critical condition” at the stack, investigations have remained ongoing, with no public update since early April 2022.¹⁰

A tear in the liner at New Wales is a serious situation, but this would not be the first time FDEP ignored the warning signs and acted too late. In fact, the FDEP reportedly ignored concerns about the Piney Point phosphogypsum stack after an independent engineer found lingering liner tears and an unacceptable risk of “catastrophic damage to the public and environment.”¹¹ The FDEP’s lack of action led to an environmental disaster that ultimately triggered the evacuation of more than 300 homes on Easter weekend in 2021, the discharge of 215 million gallons of contaminated water into Tampa Bay including approximately 186 metric tons of bioavailable

⁵ Tan, A, *Florida Fertilizer Plant Sinkhole Reportedly Leaks 215 Million Gallons of Radioactive Water Into Aquifer*, ABC News (Sept. 16, 2016).

⁶ Consent Order, *State of Florida Department of Environmental Protection v. Mosaic Fertilizer, LLC*, OGC No. 16-1356 (Oct. 24, 2016).

⁷ Letter from Vishwas Sathe, Fla. Dept. Env’tl. Mgmt to Santino A. Provenzano, Mosaic Fertilizer, LLC (Oct. 21, 2021).

⁸ Letter from Dara Ford, Mosaic Fertilizer, LLC (Mar. 24, 2022)

<https://prodenv.dep.state.fl.us/DepStaging/api/dms/26.104931.1>.

⁹ FDEP, New Wales Suspected Liner Tear (Mar. 24 2022)

<https://web.archive.org/web/20220705163407/https://prodenv.dep.state.fl.us/DepPNP/reports/viewIncidentDetails?page=41>.

¹⁰ Letter from Dara Ford, Mosaic Fertilizer, LLC (Apr. 5, 2022)

<https://prodenv.dep.state.fl.us/DepStaging/api/dms/26.104933.1>.

¹¹ Barnes, B., O’Donnell C., Sampson, Z., *Failure at Piney Point: Florida let Environmental Risk Fester Despite Warnings*, Tampa Bay Times (Apr. 17, 2021).

nitrogen, which fueled a deadly red tide that killed more than 2,000 pounds of marine life,¹² including more than 30 threatened Florida manatees.¹³

Given the seismic activity and possible liner tear at New Wales, something similar or worse could be imminent and irreversible without swift action by the EPA. These are precisely the types of dangerous outcomes to be expected when an expansion such as this fails to require reasonable assurances. To prevent the next phosphogypsum disaster, which appears imminent and inevitable under the FDEP's management, the EPA must utilize its emergency powers under either Section 7003 of RCRA or Section 504 of CWA to restrain the activities that are causing an imminent and substantial threat to human health and welfare.¹⁴

Despite the EPA finding that mismanagement of these hazardous wastes creates "environmental problems and that more stringent regulation is both necessary and desirable," phosphogypsum and process water are currently exempt from RCRA hazardous waste regulation.¹⁵ In exempting these contaminants from RCRA Subtitle C in its 1991 Bevill determination, the EPA assured the public that it would rely upon existing authority like RCRA Section 7003 to respond effectively and appropriately to "any problems that arise."¹⁶ There is a clear problem at the New Wales stack, and with the Bevill determination confounding any meaningful attempt to dispose of these hazardous wastes, the EPA must exercise its RCRA authority to prevent an imminent disaster.

Since the disposal of waste at New Wales presents a reasonable cause for concern that a potential harm to human health and the environment is imminent, the EPA must use its RCRA Section 7003 authority.¹⁷ While construction is currently paused, it could resume at any time in an area that has relic sinkholes, and with the potential liner tear, the situation presents a serious risk of harm.¹⁸ RCRA Section 7003 is a broad grant of authority enabling EPA to respond to situations exactly like this, where "Bevill wastes" that elude stringent hazardous waste regulation are presenting an imminent risk of harm.¹⁹ The EPA has the authority and justification to take whatever action may be necessary and appropriate to abate the danger at New Wales. It must do so before it is too late.

The EPA can also restrain any activities authorized by the recent Section 402 permit under their emergency authority delineated in Section 504 of the CWA. Since expansion activities at New Wales present a reasonable concern and a potential threat to human health or welfare, the EPA is authorized to bring an action immediately restraining any person causing or contributing to the

¹² Beck, M., et al., *Initial Estuarine Response to the Nutrient Rich Piney Point Release Into Tampa Bay*, Florida (2021), <https://github.com/tbep-tech/piney-point-manu/blob/main/manu-draft.docx>; Mendoza, Jesse, *Estuary Programs Blame Piney Point for Worsening Red Tide Conditions*, Sarasota Herald-Tribune (July 23, 2021).

¹³ Marine Mammal Pathobiology Laboratory, Florida Fish and Wildlife Conservation Commission, 2021 Preliminary Red Tide Manatee Mortalities, Jan 01-Dec 03 (2021), <https://myfwc.com/media/25649/2021preliminaryredtide.pdf>.

¹⁴ 33 U.S.C. § 1364.

¹⁵ Final Regulatory Determination for Special wastes from Mineral Processing (Mining Waste Exclusion) 56 Fed. Reg. 27,300, 27,315 (June 13, 1991).

¹⁶ *Id.* at 27316.

¹⁷ *United States v. Bliss*, 667 F. Supp. 1,298, 1,313 (E.D. Mo. 1987); EPA, Office of Enforcement and Compliance Assurance, *Guidance on the Use of Section 7003 of RCRA* (Dec 11, 1998).

¹⁸ *Dague v. City of Burlington*, 935 F.2d 1,343 (2d Cir. 1991).

¹⁹ EPA, OECA, *Guidance on the Use of Section 7003 of RCRA* at 14, 19 (Oct. 1997).

alleged pollution in order to cease any and all discharge. Actions under Section 504 have historically addressed a wide variety of harms, including long-term, non-immediate threats to human health and problems presented by beach closings, fish kills, contaminated sediments, and nonpoint sources.²⁰ In Florida, the EPA has used Section 504 to address leakage from deteriorating sewer pipelines in Miami, discovering the violations from news reports and eventually requiring \$1.6 billion in repairs.²¹ A similar approach could be taken at New Wales to quickly eliminate any potential harm to the environment.

A catastrophe at New Wales appears imminent, and where the state has failed, EPA must step in to protect the public from such emergency situations until disaster is clearly averted. This letter serves as evidence that a pollution source is presenting an imminent and substantial endangerment to health and welfare. The EPA can bring an action under either RCRA or the CWA and require immediate cessation of any activity that is presenting an imminent and substantial endangerment to health or the environment. The lack of federal oversight on this industry is putting the public and environment at risk of serious and imminent harm. The EPA must step in to prevent another environmental catastrophe.

Sincerely,

Center for Biological Diversity
Ragan Whitlock

Portneuf Resource Council
Shannon Ansley

Rise St. James
Sharon Lavigne

Cherokee Concerned Citizens
Jennifer Crosslin

Kissimmee Waterkeeper
John Capece

ManaSota-88, Inc.
Glenn Compton

Florida Conservation Voters
Alik Moncrief

Tampa Bay Waterkeeper
Justin Tramble

People for Protecting Peace River
Brooks Armstrong

Sierra Club Florida
Steve Wonderly

²⁰ *United States v. Vertac Chemical Corp.*, 489 F. Supp. 870 (E.D. Ark. 1980).

²¹ EPA, Miami-Dade County Clean Water Act Settlement. <https://www.epa.gov/enforcement/miami-dade-county-clean-water-act-settlement>.

Attachment B



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

Mr. J.W. Glass
EPA Policy Specialist
Center for Biological Diversity
1411 K. Street NW
Suite 13005
Washington, D.C. 20005
jwglass@biologicaldiversity.org

Dear Mr. Glass:

Thank you for your and your counterparts letter to the U. S. Environmental Protection Agency's Administrator, Michael Regan, and other Senior Staff members of the EPA. Your July 21, 2022, letter expressed concerns regarding the New Wales Phosphogypsum Stack in New Wales, Florida, following the Florida Department of Environmental Protection's (FDEP) authorization to expand the stack. Your letter was forwarded to our office in Atlanta, Georgia, for response.

Region 4 has been working closely with and remains in constant communication with FDEP who is monitoring the facility with daily reports and discussions on progress at the site. Since the March 23, 2022, incident noted in your letter, Mosaic has taken significant remedial measures to prevent the loss of flowable gypsum/water into any potential void formation. Such measures included the transfer of all flowable water from the water storage compartment of concern and quartering off the area with a barrier/berm. It is important to note that no seismic movement has been reported by Mosaic since early April 2022. EPA will continue to monitor and evaluate the need for further action in coordination with FDEP.

Thank you for your interest in protecting public health and the environment. If we may assist you in any other way please contact Jairo Castillo, Water Enforcement Branch Manager. Mr. Castillo may be reached by email at castillo.jairo@epa.gov, or by telephone at (404) 562-9257.

Sincerely,

LARRY
LAMBERTH

Digitally signed by LARRY
LAMBERTH
Date: 2022.08.16 07:25:11 -04'00'

Carol Kemker
Director
Enforcement and Compliance Assurance Division